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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76- 591

MORAINE PRODUCTS,

Cross-Petitioner,

vs.

ICI AMERICA, INC.,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Cross-Petitioner, Moraine Products, respectfully prays that a writ of certiorari be granted to review the Judgment and Opinion of the U. S. Court of Appeals for the Seventh Circuit, entered on June 18, 1976 in Appeal No. 75-1488.

OPINIONS BELOW.

The Opinion of the Court of Appeals is reported at ..... F. 2d ..... (7th Cir. 1976) and is reprinted in the Appendix hereto at p. A1, *infra*. The U. S. District Court for the Northern District of Illinois, Eastern Division, did not render a formal Opinion. However, its comments when it directed a verdict against Moraine are included in the Appendix hereto at p. A32, *infra*.

JURISDICTION.

The Judgment of the U. S. Court of Appeals for the Seventh Circuit was entered on June 18, 1976.

The jurisdiction of this Court is invoked under 28 U. S. C. §§ 1254(1) and 2101(c).

QUESTIONS PRESENTED.

1. Is it an illegal group boycott, and thus a per se violation of § 1 of the Sherman Act, for two competitors, respectively the assignee and licensee of a patent that covers the only composition found by the Food and Drug Administration to be effective in the treatment of flatulence (gas) in humans, to agree that no other competitors will be licensed under that patent without their mutual consent?

2. Can commercial misconduct which is a per se antitrust violation in one line of commerce not be a per se violation simply because it occurs in another line of commerce?

STATUTORY PROVISIONS INVOLVED.

15 U. S. C. § 1: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

STATEMENT OF THE CASE.

This case involves the monopolization by two competitors of the only composition found by the FDA to be effective in the treatment of flatulence (gas) in humans. (App. A4). One competitor acquired a patent covering that composition, and the other competitor was its licensee under the patent. Their license agreement provided that no other licenses would be

granted without their joint consent (App. A6). The avowed purpose (and effect) of the arrangement was to foreclose competition in a drug having wide appeal to the general public and ultimately accounting for tens of millions of dollars in annual sales (App. A25).

Cross-petitioner, Moraine Products (Moraine) is the assignee of the Rider patent* directed to a method of treating gas in humans by ingesting a product known as simethicone and consisting of methylpolysiloxane (MPS) and finely divided silica. In the late 1950's, Dr. J. Alfred Rider and Moraine entered into an agreement with the Stuart Pharmaceutical Co. (Stuart) under which Stuart would market the product and pay Rider and Moraine a 5% royalty, whether or not a patent ever issued on Dr. Rider's invention** (App. A4).

Also during the 1950's, W. H. Feinstone filed a patent application on the treatment of gas using MPS. Ultimately, Feinstone became employed by Plough, Inc. (Plough), a defendant below, and assigned to Plough the rights in his patent.***

Thereafter, on a visit to Stuart in 1960, on behalf of Plough, Feinstone learned of Stuart's plans to introduce the product developed by Dr. Rider, and Feinstone informed Stuart personnel of his contention that the product would infringe the soon-to-issue Feinstone patent (App. A4).

After months of correspondence and meetings in which Plough and Stuart repeatedly discussed excluding others from marketing a simethicone-containing product, Stuart unilaterally rescinded its agreement with Dr. Rider and Moraine on January 18, 1961. One day later, Stuart signed an agreement with Plough whereby Stuart obtained a license under the Feinstone patent "exclusive except as against Plough and Block Drug

* U. S. Patent No. 3,422,189.

** Stuart was acquired by Atlas Chemical Industries, Inc. (Atlas) which, in turn, became ICI America, Inc. (ICI).

*** The Feinstone patent issued on August 30, 1960 as U. S. Patent No. 2,951,011 and was reissued on July 24, 1962 as Re. 25,205.

Co."* Neither Plough nor Stuart had the right unilaterally to license others. As stated by the Seventh Circuit, the effect of the agreement is that further licensing under the Feinstone patent can only be accomplished by joint agreement between the competitors, Stuart and Plough (App. A6).

Almost immediately after the signing of the Stuart-Plough agreement in 1961, Atlas announced its acquisition of Stuart. Thereafter, over 40 drug companies, including the leading American manufacturers of digestive aids, requested licenses under the Feinstone patent from the defendants. In many instances, the requests were turned down peremptorily. On some occasions, Plough considered granting a license, but after consultation with Atlas, the granting of a license was always vetoed. On a number of other occasions, Atlas discovered competitive but unlicensed simethicone-containing products on the market and demanded that Plough take whatever steps were necessary to eliminate this competition. To the date of the filing of this suit, not a single license was ever granted (App. A24-5).

In 1961, Moraine sued Atlas because of Stuart's rescission of its earlier agreement with Moraine. In June 1962, that suit was settled upon terms which granted Atlas an option to obtain licenses for itself or others under any patent that might issue on Rider's invention (App. A6).

The Rider patent issued in January, 1969 after a long, complex patent interference proceeding in which Rider prevailed. Atlas thereupon exercised its option and commenced paying royalties to Moraine. Under the agreement with Moraine, and unlike its agreement with Plough, Atlas had the sole right to

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* Stuart (Atlas) combines simethicone with an antacid in its Mylanta product. Virtually the same formulation is used in Plough's DiGel. Block appeared on the market with a product including simethicone and digestive enzymes while Plough and Stuart were ironing out the terms of their agreement. When Block refused to remove the product and threatened litigation, Stuart and Plough agreed to provide it with a limited license for such enzyme preparations. No other licenses were ever granted prior to this suit.

obtain licenses for others under the Rider patent. Because of the overlapping nature of the Rider and Feinstone patents, any drug company wishing to market a product employing simethicone for treating gas in humans required a license under both patents.* Because of Atlas' and Plough's diligence and success in excluding competition from the market, the only simethicone-containing products available for licensing under the Rider patent were those of Atlas, Plough, and Block (App. A24-5).

In 1970, Atlas filed a declaratory judgment suit against Moraine which resulted in the Rider patent being declared invalid based on a prior public use unknown to Rider or Moraine but long before known by Atlas which withheld this knowledge from Rider and Moraine. *Atlas Chemical Industries, Inc.* v. *Moraine Products, Inc.*, 350 F. Supp. 353 (E. D. Mich. 1972), *aff'd. in part, rev'd. in part*, 509 F. 2d 1 (6th Cir. 1974).**

It is Moraine's contention that, but for the illegal boycott of potential licensees by Plough and Atlas, Moraine would have obtained increased royalty income during the period when the Rider patent was presumed valid. Moraine produced evidence of that fact at trial.***

Moraine urged below that the Atlas-Plough agreement constituted a *per se* violation of § 1 of the Sherman Act (15 U. S. C. § 1) and, in the alternative, that under the rule-of-reason approach, the contract between and conduct of Atlas and Plough was an unreasonable restraint of trade.

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* The invention embodied in the Rider patent was an improvement over the invention embodied in the Feinstone patent, thus necessitating a license under both. *Temco Electric Motor Co.* v. *Apco. Mfg. Co.*, 275 U. S. 319, 328 (1928).

** The district court held that Atlas' conduct in withholding information of the prior public use from Moraine was a "disdain of the public interest". 350 F. Supp. at 358-59.

*** The trial court separated the issues of liability and damage, the former issue going to trial. When it directed its verdict on the liability issue, the trial court found that Moraine had made a *prima facie* case on the fact of damage.

At the close of Moraine's case, the district court directed a verdict against Moraine on both theories of recovery. Although no formal opinion was prepared, the district court stated that it was impressed by the law of the Seventh Circuit which

> "to me indicated if there is a conflict between patent law and antitrust law, that the patent law will prevail unless the antitrust laws specifically or by necessary implication amend the patent laws." (App. A33.)

Moraine's suit against Plough was settled shortly after the directed verdict. Thereafter, Atlas was the only defendant remaining in the case.

On appeal, Moraine again argued the *per se* illegality of the Atlas-Plough conduct and that, even if there was no *per se* violation, there was sufficient evidence to take the case to the jury under the rule-of-reason theory. Atlas argued a number of other reasons why the district court decision should be upheld in addition to those relied upon by the district court.

The Seventh Circuit rejected Atlas' arguments and held that, although the Atlas-Plough arrangement was not *per se* prohibited by the Sherman Act, Moraine had still established a *prima facie* case under the rule-of-reason theory, requiring submission of that issue to the jury (App. A21-26). The Seventh Circuit therefore remanded the case for a new trial.

This cross-petition presents questions concerning *per se* illegality, only.

REASONS FOR GRANTING CROSS-PETITION FOR A WRIT OF CERTIORARI.

The decision of the Seventh Circuit with regard to *per se* illegality under § 1 of the Sherman Act involves both (a) questions that were decided in conflict with applicable decisions of this Court, and (b) important questions of federal law which have not been, but should be settled by this Court.

THE DECISION OF THE SEVENTH CIRCUIT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

In refusing to condemn the group boycott effectuated by Atlas and Plough, the Seventh Circuit's decision is in direct conflict with decisions of this Court. Such decisions hold that, where, as here, several competitors refuse to deal with another, admittedly for the purpose of eliminating competition, the conduct is *per se* illegal. *Fashion Originators' Guild of America, Inc.* v. *FTC,* 312 U. S. 457 (1941). "[W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct." *United States* v. *General Motors Corp.,* 384 U. S. 127, 146 (1966). "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category." *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U. S. 207, 212 (1959).

The 7th Circuit itself described the license here as constituting a group boycott when it said:

> "Here, the applicant [for a license] must secure the consent of the two parties, the licensor and its immediate licensee. This arrangement, which requires joint action of two parties before an applicant can secure a license, permits undesirable applicants to be *boycotted through concerted action.*" (App. A12.)*

The Seventh Circuit apparently distinguished the boycotts previously condemned by this Court from the conduct here because of the presence of a patent license. However, this Court has on repeated occasions recognized that, although copyright and patent holders have the right to grant licenses or assignments, they cannot use those rights to suppress competition through joint action. *Interstate Circuit* v. *United States,* 306 U. S. 208, 227-30 (1939); *United States* v. *Masonite*

* Emphasis is always added.

Corp., 316 U. S. 265, 277 (1942); *United States* v. *The Singer Mfg. Co.*, 374 U. S. 174, 193-95 (1963).

The only cases that have previously dealt with the legality of patent licenses requiring joint consent of competitors before additional licenses could be granted have condemned such provisions. *United States* v. *Besser Mfg. Co.*, 96 F. Supp. 304, 311 (E. D. Mich. 1951), *aff'd.*, 343 U. S. 444 (1952); *United States* v. *Krasnov*, 143 F. Supp. 184, 201-03 (E. D. Pa. 1956), *aff'd. per curiam*, 355 U. S. 5 (1957); *Mason City Tent & Awning Co.* v. *Clapper*, 144 F. Supp. 754, 767 (W. D. Mo. 1956); *Clapper* v. *Original Tractor Cab Co.*, 165 F. Supp. 565, 576 (S. D. Ind. 1958); *United States* v. *Associated Patents, Inc.*, 134 F. Supp. 74, 79-80, 82-3 (E. D. Mich. 1955), *aff'd. per curiam*, 350 U. S. 960 (1956); *McCullough Tool Co.* v. *Well Surveys, Inc.*, 343 F. 2d 381, 407 (10th Cir. 1965), *cert. denied*, 383 U. S. 933 (1966).

The Seventh Circuit attempted to distinguish this uninterrupted line of authority by saying:

> "*Krasnov* involved pooling of patents, price fixing and the institution of punitive infringement suits for the purpose of harrassment rather than with the intention that they be adjudicated on the merits. In *Besser*, the conspiracy involved pooling of patents, an agreement to pool future improvement patents, interlocking directorates, the use of improper influence on suppliers or competitors to curtail their output, and recklessly make threats of suit. Each of the leading cases cited by Moraine in support of its theory of per se illegality involved a broad spectrum of anticompetitive conduct on the part of the defendants." (App. A9.)

However, although the defendants in the above-cited cases may have been guilty of other unlawful practices, the courts there made it abundantly clear that the license provisions requiring joint consent of competitors before licenses could be granted were in and of themselves unlawful.

For example, in *Besser:*

> "The contract even gives Stearns and Besser the power to restrict competition—present and future—by requiring their joint consent before licensing others. *It is this combination requiring collective action that primarily invalidates the agreement.*" 96 F. Supp. at 311.

In *Krasnov:*

> "the Court notes here a *situation where no one, the patentee, the assignee, or the licensee, can create any rights under the patent in any other person without the consent of the other two.* The owner of the patent and the two dominant manufacturers in the trade have so bound themselves. Although these facts are not identical with those in United States v. Besser Mfg. Co., [citation omitted] I think *the evil which the court there struck down exists here, namely, (1) the veto power over licensing rights granted to a licensee and (2) the contractual arrangement which created the power to restrict competition by requiring joint consent before others could be licensed.*" 143 F. Supp. at 201-03.

In *Mason City Tent & Awning Co.:*

> "Hence it is held that an agreement by a patentee which gives a non-exclusive licensee a veto power in the selection of other licensees, is invalid according to Sherman Act standards. [Citations omitted.]
>
> It cannot be successfully contended by defendants that the terms of the license agreement, supra, are not, per se, violative of Section 1 of the Sherman Act in the aspects hereinabove considered, and we so adjudge it." 144 F. Supp. at 767.

In *Clapper:*

> "An agreement by a patentee which gives a non-exclusive licensee a veto power in the selection of other licensees is invalid according to Sherman Act standards, Sections 1 and 2." 165 F. Supp. at 576.

The Seventh Circuit also referred to "Atlas' assertion of sound commercial grounds for its desiring the challenged patent

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The Seventh Circuit also referred to "Atlas' assertion of sound commercial grounds for its desiring the challenged patent

license" as a basis for rejecting the *per se* approach (App. A19).* However, following the Seventh Circuit rationale, such "grounds" can be asserted to "justify" even the most offensive previously condemned predatory conduct. For example: If Atlas and Plough had decided that their investment in developing the simethicone-containing products could only be protected by fixing the price of Mylanta and DiGel, they would have received little sympathy from the courts. Their "economic motivation" for engaging in a group boycott is equally irrelevant. *United States* v. *General Motors Corp.*, 384 U. S. 127, 146 (1966). Maximizing profits at the consumer's expense as a result of concerted activity between competitors is hardly a sound basis for retreating from the carefully evolved doctrine of *per se* illegality.

THE SEVENTH CIRCUIT CONTENDS THAT THE ISSUE OF PER SE ILLEGALITY INVOLVED HERE IS AN UNSETTLED ONE.

It is important that this Court consider the question of *per se* illegality presented here because the Seventh Circuit indicated that the question was one unsettled by this Court.**

As expressly noted by the Court of Appeals, there is a significant body of authority, comprising decisions and the pronouncements of commentators and Department of Justice officials, recognizing the *per se* illegality of the licensing restriction embodied in the Atlas-Plough agreement. However, what the Court of Appeals thought to be a lack of unanimity made it

* The "commercial grounds" are apparently derived from Atlas' statement in the Court of Appeals: "Protected by its license from Plough, Stuart, a small manufacturer was able to make the investment required to enter the intensely competitive antacid market. . . ." Brief of Defendant-Appellee Atlas (ICI America, Inc.), p. 19.

** As noted above, we contend that the decision of the Seventh Circuit is contrary to applicable decisions of this Court. The Seventh Circuit, however, contends that the issue of *per se* illegality, here, is an unsettled one. If this is true, it is another reason why this question should be considered by this Court.

reluctant to employ the *per se* label here. In doing so, the Seventh Circuit decision itself specifies the reasons for granting this cross-petition. For example:

> "Although officials of the Antitrust Division have indicated the view stated above, [for *per se* illegality] recent filings of civil actions challenging the validity of licensing practices apparently reflect diffuse approaches, so that *commentators find difficulty in uncovering 'any consistent theories that might guide patentees, licensees and their counsel in structuring licensing programs.' Andelman & Juenger*, supra at 300-01.
>
> "In sum, patent and antitrust champions have debated for a number of years the reach of such cases as *Krasnov* and *Besser*." (App. A7-8.)

and;

> "Resort to *the writings of both patent and antitrust specialists* provides a framework for judicial analysis but *does not effectively resolve the basic question here presented*." (App. A9.)

also;

> "*The absence of any exacting analysis* of the precise nature of the views of the [antitrust] Division, which this court although not bound thereby would respectfully consider, is but one of the factors which makes this court hesitate in accepting Moraine's reading of the outer reaches of the Supreme Court's per curiam opinion [In *Krasnov*]." (App. A9.)

* * * * *

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* After noting the previously articulated position of the Department of Justice strongly asserting the *per se* illegality of the type of license provision involved here, the Court below totally rejected that position by placing undue emphasis on a recent letter expressing the Department's intention not to oppose what the Court below mistakenly deemed to be a similar licensing plan proposed by the Salk Institute for Biological Sciences (App. A9-10). In any event such a letter (sometimes referred to as a "business review letter") states only the antitrust division's present enforcement intentions with respect to proposed business conduct. Antitrust Law Developments, Antitrust Section of American Bar Association, 1975, p. 232; 28 C. F. R. § 50.6, as amended by 38 Fed. Reg. 34804 (1973). That intention does not make lawful what is otherwise unlawful nor does it provide antitrust immunity.

> "The objectionable nature of the limited exclusive license rests basically upon an analysis of the anticompetitive possibilities that such a licensing scheme presents. The authors whose analysis we have paraphrased go on to observe, citing, inter alia, *Krasnov* and *Besser, that the issue remains unsettled.*" (App. A12.)

There is another reason advanced by the court below in support of its refusal to apply the *per se* doctrine which, in its view, apparently involves an important question not settled by this Court. This reason, unsupported by any record, involves the alleged special status of the drug industry. In this connection, the court below states that "the patent structure" of the drug industry is peculiar in several respects and apparently accepts the proposition that competition might be "restimulated by adopting a limited number of rules that would classify patent licensing practices in the drug industry, at least for antitrust purposes, in accordance with their propensity to suppress patent attack by licensees". (App. A17.)

This Court, of course, has never indicated that the *per se* doctrine should not be applied, to the drug industry, or to any other industry. We believe that if there is to be such a startling departure from prior decisions of this Court (cited above at pp. 7-8), it should be accomplished legislatively* but, if not, the matter should be expressly settled here.

CONCLUSION.

The decision of the Seventh Circuit emasculates the *per se* doctrine for it seeks improperly to impose incredibly complicated elements of proof to establish a group boycott as a violation of the Sherman Act (App. A17-19) rather than to facilitate the condemnation of this obviously pernicious and predatory conduct. As such, the decision below is directly contrary to the decision of this Court in *Northern P. R. Co.* v. *United States,*

* See concurring opinion of Justice Blackmun in *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 613 (1972).

356 U. S. 1 (1958) where, in classifying a group boycott as *per se* illegal, this Court stated, 356 U. S. at 5:

> "This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are . . . group boycotts. . . ."

Respectfully submitted,

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